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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6766

CARL ALBERT COLLINS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ARKANSAS

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL AUTHORITIES CITED

SUPPLEMENTAL BRIEF

Petitioner was convicted of capital felony murder and sentenced to death by electrocution under Ark. Stat. Ann. §41-4701 et al (supp. 1973). Since petitioners conviction and since the petition for writ of certiorari was filed, the United States Supreme Court has upheld the constitutionality of Statutes in Georgia, Florida and Texas which are similar to the Arkansas Statute under which petitioner was convicted and sentenced. Gregg v. Georgia, ___ U. S. ___, 49 L.Ed. 2nd 859 (1976), Proffitt v. Florida, ___ U. S. ___, 49 L.Ed. 2nd 913 (1976), Jurek v. Texas, ___ U. S. ___, 49 L.Ed. 929 (1976). In Gregg v. Georgia, supra, the Court emphasized the Statutory provisions in the Georgia law requiring the Georgia Supreme Court to review every death sentence and to determine whether the sentence in a particular death case is excessive or disproportionate to the penalty in similar cases after considering the defendant and the particular crime. Ga. Code Ann. §27-2537(c)(3) (supp. 1975).

> The provision for appellate review in the Georgia Capital-Sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. Gregg v. Georgia, ___ U. S. ___, 49 L.Ed. 859, 893.

Mr. Justice White in his concurring opinion in Gregg v. Georgia, ___ U. S. ___, 49 L.Ed. 2nd 859, 896, points out that the Georgia legislature went so far as to create the post of Assistant to the Supreme Court for the purpose of accumulating information with which the Georgia Supreme Court can make comparisons to determine whether the sentence in a particular death case is appropriate.

In his concurring opinion Mr. Justice White also pointed out that the Georgia Supreme Court has taken the Statutory requirement seriously and has in several cases remanded the case

for resentencing from death to life imprisonment. Gregg, supra.

The Capital Felony Statute in Florida provides for automatic review by the Florida Supreme Court of any death penalty case. Proffitt v. Florida, ___ U. S. ___, 49 L.Ed. 2nd 913, 922 (1976). The Court points out that the Florida Supreme Court has endeavored to make comparisons between the various death penalty cases to determine whether or not the punishment is appropriate in any particular case and also that the Florida Supreme Court has in fact vacated 8 of the 21 death sentences reviewed as of the date of the opinion of this Court. Proffitt v. Florida, ___ U. S. ___, 49 L.Ed. 2nd 913, 923 (1976).

The Texas Statutory scheme which was upheld by this Court in Jurek v. Texas, supra, provides for an expedited appellate review of death penalty cases by the Texas Court of Criminal Appeals. Texas Code Crim. Proc., Art. 37.071(f) (supp. 1975-1976).

> The Texas Court of Criminal Appeals has thus far affirmed only two judgments imposing death sentences under its post-Furman law... Jurek v. Texas, ___ U. S. ___, 49 L.Ed. 2nd 929, 937 (1976).

The Court of Criminal Appeals of Texas is exercising comparative sentencing authority to reduce excessive sentences.

> By providing prompt judicial review of the jury's decision in a court with state-wide jurisdiction, Texas has provided a means to promote the even handed, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the constitution. Jurek v. Texas, ___ U. S. ___, 49 L.Ed. 2nd 929, 941 (1976).

The Arkansas Statute is distinguishable from those in Gregg, Proffitt, and Jurek, supra, for two reasons. There is no Arkansas statutory authority for an automatic or mandatory appeal of a death penalty case and there is no Arkansas statutory authority for comparing a death penalty case with similar cases to determine if the sentence in a particular case is appropriate. As a practical matter it is unlikely that a death penalty case would not be appealed to the Arkansas Supreme Court but without any provision in the law requiring such an appeal there is always a real possibility of a defendant being sentenced to death and excuted without his case ever being

reviewed by an appellate court.

In Collins v. State, 259 Ark. 8, 13, 531 S.W. 2nd 13, 15 (1975), the Arkansas Supreme Court referred to the fact that the Arkansas statute requires the jury to make a written finding with respect to various aggravating and mitigating circumstances so that the basis for the verdict is known and can be compared with punishment imposed in other cases. A review of the complete opinion in Collins, supra, reveals that while the court indicates such a comparison could be made the court in fact did not make such a comparison.

It appears that the Arkansas Supreme Court has taken the position that even if such a comparison could be made the Arkansas Supreme Court has no authority to reduce a sentence from death to life imprisonment except in a case where there was error of law in the proceeding. Hooper v. State, 257 Ark. 103, 514 S.W. 2nd 394 (1974). At various times in the past and as late as 1943 the Arkansas Supreme Court has, based on the authority of Ark. Stat. Ann. §27-2144 (repl. 1962) (see appendix page A-1), and the predecessors of this statute, reduced the sentence in cases for the simple reason that the Court deemed the sentences excessive. Carson v. State, 206 Ark. 80, 173 S.W. 2nd 122 (1943), Hadley v. State, 196 Ark. 307, 117 S.W. 2nd 352 (1938), Davis v. State, 55 Ark. 245, 244 S.W. 750 (1922), Hinson v. State, 76 Ark. 267, 88 S.W. 965 (1905).

However at various times the Court apparently took a contrary position, indicating that the Court had no authority to reduce a sentence because it was excessive; but rather could only reduce a sentence if the evidence was insufficient to support the verdict of guilty of the particular crime for which the defendant was sentenced. Simpson v. State, 56 Ark. 8, 19 S.W. 99 (1892), Allison v. State, 204 Ark. 609, 164 S.W. 2nd 442 (1942), Nail v. State, 231 Ark. 70, 328 S.W. 2nd 836 (1959), Osborne v. State, 237 Ark. 170, 371 S.W. 2nd 520 (1963). Osborne, supra, held that the Arkansas Supreme Court had no authority to reduce a sentence unless there had been an error of law which

resulted in the excessive sentence. In 1971, the Arkansas legislature, perhaps because the case law remained unsettled on this point, passed an act codified as Ark. Stat. Ann. 43-2725.2 (supp. 1975) (repealed effective January 1, 1976) specifically giving the Arkansas Supreme Court the power to reduce a sentence on appeal if the court deemed the sentence excessive. (see appendix, Page A-2) Subsequent to the passage of this statute the Arkansas Supreme Court in Tenpenny v. State, 256 Ark. 523, 508 S.W. 2nd 752 (1974), stated that in the case before them, assuming that Ark. Stat. Ann. 43-2725.2 (supp. 1973) (repealed effective January 1, 1976) gave the court the authority to reduce appellant's sentence the court was not inclined to do so, but specifically declined to rule that the Statute did in fact give the court such authority.

In 1974 the Arkansas Supreme Court in Hooper v. State, supra, considered this issue specifically; holding that the Court had no authority to reduce a sentence for the reason that the Court deemed the sentence excessive and that Ark. Stat. Ann. §43-2725.2 (supp. 1973) (repealed effective January 1, 1976), was unconstitutional if construed otherwise, stating as follows:

> Finally, it is asserted that the verdict of the jury is excessive and indicates passion and prejudice on the part of the jury. We have held that we have no authority to reduce a sentence that is not in excess of Statutory limits, and we have consistently in recent years, followed that rule. In Osborne v. State, 237 Ark. 5, 371 S.W. 2nd 518 (1963), we said:
> "Counsel vigorously maintains that the punishment is so severe that it should be reduced by this court. It is true that in a number of the older cases, including one as recent as Carson v. State, 206 Ark. 80, 173 S.W. 2nd 122, we have assumed the power to mitigate the punishment imposed by the trial courts. The right to exercise clemency is, however, vested not in the courts but in the chief executive. Ark. Const. Art. 6, §18. Our latest cases have uniformly followed the rule, which we think to be sound, that the sentence is to be fixed by the jury rather than by this court. If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce it even though we may think it to be unduly harsh."
> In 1971, the general assembly enacted Act 333 (Ark. Stat. Ann. §43-2701 - 43-2725.2 [supp. 1973], §12 (§43-2725.2) attempting to vest this court with the authority to reduce sentences that it deemed excessive. In Abbott v. State, 256 Ark. 558, 508 S.W. 2nd 733 (May, 1974), we construed this provision, stating:
> "Although we have previously found it unnecessary to pass directly on the constitutionality of the provision insofar as it might be construed to empower this court

to reduce a sentence otherwise proper and within Statutory limits in cases arising after passage of the act, it should be clear that legislative action cannot override constitutional provisions. We strongly intimated that this act was ineffective to overrule the holding in Osborne v. State, supra, in Hurst v. State, supra, [251 Ark. 40, 470 S.W. 2nd 815], and cited the case of People v. Odle, 37 Cal. 2nd 52, 230 p. 2nd 345 (1951). In that case a similar statute was construed by the California Court to do no more than authorize it to reduce the punishment, in lieu of granting a new trial, when the only error found on appellate review related to the punishment imposed and was prejudicial. It specifically held that the statute granted no power to modify a sentence where there was no error in the proceeding. To construe the statute otherwise, said the court, speaking through Justice Traynor, would give the reviewing court clemency power similar to those vested in the Govenor by the California Constitution. That court clearly recognized that any construction of the statute extending the power of the appellate court any further would raise serious constitutional questions relating to the separation of powers. We think the construction given to the California Statute by that state's Supreme Court was correct and that the same construction should be given our Statute. When given that construction, it is clearly constitutional. If construed to give this court the power to reduce a sentence in the absense of error pertaining to the sentence, the Statute would be unconstitutional for violation of Art. 6, §18 and Art. 4, §2 of the Arkansas Constitution, and upon the authority of Austin v. State, supra." Hooper v. State, 257 Ark. 103, 110, 514 S.W. 2nd 394, 399.

Effective January 1, 1976, that portion of Ark. Stat. Ann. §43-2725.2 (supp. 1973) (repealed effective January 1, 1976), which gave the Arkansas Supreme Court the power to reduce a sentence which the court deemed excessive was deleted. Ark. Rules Crim. Proc. 36.25. (see appendix page A-3) This deletion was apparently made because the Arkansas Criminal Code Revision Commission, at the time the proposed rules of criminal procedure were being drafted, recognized that the Arkansas Supreme Court was taking the position that it could not, in adherence to the Arkansas Constitution, reduce a sentence simply because the court deemed it excessive in the particular case. See, Commentary To Article X, Ark. Rules Crim. Proc. 36. (See appendix page A-3)

The Arkansas Supreme Court has held in Hooper v. State, supra, that it cannot in keeping with the Arkansas Constitution compare the sentence imposed by the jury in one case with the sentence imposed by the jury in similar cases and reduce a sentence which the court deems to be excessive. Petitioner

therefore submits that under the present Arkansas Statutory scheme and case law there can be no "guarantee... that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case..." Proffitt v. Florida, ___ U. S. ___, 49 L.Ed. 2nd 913, 922 (1976) quoting State v. Dixon, 283 So. 2nd 1, 10 (1973).

SUPPLEMENTAL APPENDIX

Ark. Stat. Ann. §27-2144 (Repl. 1962)

The Supreme Court may reverse, affirm or modify the judgement or order appealed from, in whole or in part and as to any or all parties, and when the judgment or order has been reversed, or affirmed, the Supreme Court may remand or dismiss the cause and enter such judgment upon the record as it may in its discretion deem just; provided, when a cause is affirmed, or reversed and remanded, the mandate must be taken out and filed in the court from which the appeal was taken by the plaintiff or defendant within one (1) year from the rendition of the judgment, affirming or reversing the cause, and not thereafter; and immediately upon the expiration of the period of one (1) year after the judgement of reversal is entered, when the mandate is not taken out, the clerk of the Supreme Court shall upon application of the party entitled thereto issue an execution for all costs accrued to the date of reversal in the Supreme Court and in the Court from which said cause has been appealed.

Ark. Stat. Ann. §43-2725.2 (supp. 1975) (repealed, effective January 1, 1976)

A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution, the laws of Arkansas or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed, but the sentence of the appellant may be reduced if it is deemed excessive. [Acts 1971, No. 333, §12, p. 827].

COMMENTARY TO ARTICLE X, Ark. Rules Crim. Proc. 36.

"Rule 36.25 governs disposition of the case on appeal and provides for remands and dismissals. Originally, Rule 36.25, following §12 of Act 333, permitted reduction of excessive sentences. This clause has been deleted. The constitutionality of vesting such power in the judiciary has been recently questioned. See, Cotton v. State, 256 Ark. 527, 508 S.W. 2nd 738 (1974); Tenpenny v. State, 256 Ark. 523, 508 S.W. 2nd 752 (1974); and Hurst v. State, 251 Ark. 40, 470 S.W. 2nd 815 (1971).

Ark. Rules Crim. Proc. 36.25

A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution, the laws of Arkansas or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed.